

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

ON-THE-RECORD

2000-D45

**PROVIDER -**

Edgewater Medical Center  
Chicago, Illinois

**DATE OF HEARING-**

September 23, 1999

Provider No. 14-0087

Cost Reporting Period Ended -  
December 31, 1991

**vs.**

**INTERMEDIARY -** Blue Cross and Blue  
Shield Association/Blue Cross and Blue  
Shield of Illinois

**CASE NO.** 94-0614

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ISSUE:

Was the Intermediary's calculation of the Provider's disproportionate share adjustment proper?

STATEMENT OF CASE AND PROCEDURAL HISTORY:

Edgewater Medical Center ("Provider") is a general short-term hospital located in Chicago, Illinois. The Provider treats a disproportionate share ("DSH") of low income patients and sought the appropriate adjustment under 42 C.F.R. § 412.106. In calculating the Provider's DSH adjustment, Blue Cross and Blue Shield of Illinois ("Intermediary") did not include inpatient days for patients that were dually eligible for both Medicaid and Medicare. The Provider requested a Provider Reimbursement Review Board ("Board") hearing pursuant to Medicare regulations at 42 C.F.R. §§ 405.1835-.1841 and has met the jurisdictional requirements of the regulations. The Medicare reimbursement amount is controversy exceeds \$3,573,908.

The calculation of the DSH adjustment has been the subject of considerable litigation. The Secretary's regulation limited the count of inpatient days in the formula to only those for which patients were "entitled" to payment under the state Medicaid plans versus the larger number of inpatient days that patients may have been "eligible" for Medicaid. The principal case on this issue, Jewish Hospital, Inc. v. Secretary of Health and Human Services, 19 F.3d 270 (6th Cir. 1994) ("Jewish"), found that the statute, at 42 U.S.C. § 1395ww(d)(5)(F)(vi), provided that the number of "eligible" days be used and that the Secretary's regulation using the number of "entitled" days was improper. As a result of this and other cases with similar holdings, the Health Care Financing Administration ("HCFA") issued a ruling changing its position. See HCFA Ruling 97-2.

The instant case had an adjustment pertaining to the "eligible" versus "entitled" issue, but that matter was resolved. See Provider Letter Dated May 7, 1999. The remaining issue concerns the inclusion of inpatient days in the formula for "dually eligible" patients, that is, inpatient days for patients who were eligible for both Medicaid and Medicare Part A.

The statute at issue provides the following concerning the DSH calculation:

the numerator of which is the number of the hospital's patient days for such period which consists of patients who (for such days) were eligible for medical assistance under a State plan approved under subchapter XIX of this chapter [Medicaid], but who were not entitled to benefits under part A of this subchapter [Medicare], and the denominator of which is the total number of the hospital's patient days for such period.

42 U.S.C. § 1395ww(d)(5)(F)(vi)(II).

The Secretary adopted the following language in implementing the statute:

(b) Determination of hospital's disproportionate patient percentage 1)  
General rule.

A hospital's disproportionate patient percentage is determined by adding the results of two computations and expressing the sum as a percentage . . .

(d) Second Computation. The fiscal intermediary determines, for the hospital's cost reporting period, the number of patient days furnished to patients entitled to Medicaid but not to Medicare Part A, and divides that number by the total number of patients in that same period . . .

42 C.F.R. § 412.106(b)(4).

HCFA issued a memorandum to Associate Regional Administrators on June 12, 1997, See Intermediary Exhibit 3, entitled HCFA Ruling 97-2 Instructions. Concerning the dually eligible issue, it stated the following:

The definition of Medicaid days for purposes of the Medicare disproportionate share adjustment calculation includes all days that a beneficiary would have been eligible for Medicaid benefits, whether or not Medicaid paid for any services . . . . However, 42 C.F.R. § 412.106(b)(4) precludes the counting of any patient days furnished to patients entitled to both Medicare Part A and Medicaid. Therefore, once the State has verified the eligibility of the hospital's patient data for Medicaid purposes, the intermediary must determine if any of these days are dual entitlement days and subtract them from the calculation.

Id. at 2.

The Intermediary followed the instructions above and did not include the dually eligible inpatient days in the Provider's DSH calculation. The Provider indicates that language in a DSH case, Deaconess Health Services Corp. v. Shalala, 912 F. Supp. 438, 447 (E.D. Mo. 1995, aff'd, 83 F.3d 1041 (8th Cir. 1996), ("Deaconess") suggests that dually eligible days should be included in the calculation. The court in Deaconess stated that:

[i]f a person is generally eligible for medical assistance under a State plan approved by Medicaid while receiving Part A services, then all of the days during which such services were received during such eligibility should be included in the numerator of the Medicaid Low Income Proxy, whether or not the State Medicaid plan pays for all such days.

Nothing in the statute permits the Secretary to disregard part of the patient's duration of the receipt of Medicare Part A services while otherwise Medicaid eligible and to substitute instead a hospital's limited Medicaid payment entitlement.

The Provider was represented by Carel T. Hedlund, Esquire, of Ober, Kaler, Grimes and Shriver. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

#### PROVIDER'S CONTENTIONS:

The Provider contends that dually eligible beneficiaries should be included in the calculation of the DSH adjustment.

The Provider notes that HCFA's interpretation of the DSH statute has been overruled concerning the entitled versus eligible issue and that in Deaconess, supra, the court indicated, in the above cited quotation, that dually eligible inpatient days should be included in the calculation.

The Provider requests that the Board amend the disallowance and direct the Intermediary to recalculate its DSH adjustment with the inclusion of dually eligible inpatient days.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary states that it cannot include days related to patients entitled to both Medicaid and Medicare Part A (referred to as dual entitlement or crossover days) in the DSH Medicaid fraction. The Intermediary notes that in HCFA Ruling 97-2, HCFA only agreed to count the Medicaid patient days on the basis of eligibility rather than the Medicaid payment for the related services. In a subsequent HCFA Memorandum, dated June 12, 1997,<sup>1</sup> HCFA clarified the ruling as follows:

The definition of Medicaid days for purposes of the Medicare disproportionate share adjustment calculation includes all days that a beneficiary would have been eligible for Medicaid benefits, whether or not Medicaid paid for any services. This includes, but is not limited to, days that are determined to be medically necessary but for which payment is denied, days that are utilized by a Medicaid beneficiary prior to an admission approval, days that are paid by a third party, and days that an alien is considered a Medicaid beneficiary, whether or not it is an emergency service. However, 42 C.F.R. § 412.106(b)(4) precludes the counting of any patient days furnished to patients entitled to both Medicare Part A and Medicaid. Therefore, once the State has

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<sup>1</sup>

Intermediary Exhibit 3 at 2.

verified the eligibility of a hospital's patient data for Medicaid purposes, the Intermediary must determine if any of these days are dual entitlement days and subtract them from the calculation.

HCFA Ruling 97-2 Instructions, HCFA Memorandum, June 12, 1997 (emphasis added).

The Intermediary contends that the federal courts have not elaborated on the subject of dual eligibility or crossover patients. Regardless, the Intermediary maintains that the statute and regulation that prohibit inclusion of these days should be followed.

#### CITATIONS OF LAWS, REGULATIONS AND PROGRAM INSTRUCTIONS:

##### 1. Laws - 42 U.S.C.:

§ 1395ww(d) <u>et seq.</u>	- Prospective Payment System ("PPS") Transition Period; DRG Classification System; Exceptions and Adjustments to PPS
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##### 2. Regulations - 42 C.F.R.:

§§ 405.1835-.1841	- Right to Board Hearing - Time, Place, Form and Content of Request for Board Hearing
§ 412.106	- Special Treatment: Hospitals that Serve a Disproportionate Share of Low- Income Patients

##### 3. Cases:

Deaconess Health Services Corp. v. Shalala, 912 F. Supp. 438 (E.D. Mo. 1995), aff'd, 83 F.3d 1041 (8th Cir. 1996).

Jersey Shore Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of New Jersey, PRRB Case No. 99-D4, Medicare and Medicaid Guide (CCH) ¶ 80,083, October 30, 1998, vacated and remanded, HCFA Administrator, January 4, 1999, Medicare and Medicaid Guide (CCH) ¶ 80,153.

Jewish Hospital, Inc. v. Secretary of Health and Human Services, 19 F.3d 270 (6th Cir. 1994).

5. Other:

HCFA Ruling 97-2, February 27, 1997 - Interpretation of Medicaid Days in Medicare DSH Adjustment Calculation

HCFA Memorandum, June 12, 1997 - HCFA Ruling 97-2 Instructions

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, testimony elicited at the hearing, and post hearing brief, finds and concludes as follows:

The Board notes that the Provider is requesting the inclusion of all days for those eligible for both Medicaid and Medicare Part A. The Board notes that both the statute and regulation state that those beneficiaries who are entitled to Medicaid and Medicare Part A are not included in the numerator of the calculation. The Board does not find the language in Deaconess, supra, cited by the Provider directly relevant to the issue in the instant case. The Board finds that the Intermediary properly excluded the dually eligible days from the DSH calculation. The Board continues to maintain that the DSH numerator should include days of dually eligible patients whose Medicare Part A benefits were exhausted and who were eligible for reimbursement under the State's Medicaid plan. See Jersey Shore Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of New Jersey, PRRB Case No. 99-D4, Medicare and Medicaid Guide (CCH) ¶ 80,083, October 30, 1998, vacated and remanded, HCFA Administrator, January 4, 1999, Medicare and Medicaid Guide (CCH) ¶ 80,153 ("Jersey").

The Provider's argument indicates that dually eligible beneficiaries days should be included in the DSH numerator without any indication that any of these days are for beneficiaries who may have exhausted their Medicare Part A benefits. The Board finds that the language of the statute and regulation states that those eligible for Medicaid and entitled to Medicare Part A benefits are not included in the numerator of the DSH calculation. See 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) and 42 C.F.R. § 412.106(b)(4).

The Board notes that the decision in Deaconess, supra, addresses the same issue as Jewish Hospital, Inc. v. Secretary of Health and Human Services, 19 F.3d 270 (6th Cir. 1994) ("Jewish"), that is, whether the Secretary's regulation restricting Medicaid days to entitled versus eligible days was valid. The Board finds that the language cited by the Provider only relates to the portion of the statute at issue in the Jewish case, and not the portion of the same statute at issue in the instant case dealing with dually eligible beneficiaries. Therefore, the Board finds that neither the language in Deaconess, nor the language in Jewish, is relevant to this case.

Since there is no indication that any of the Medicaid days for dually eligibles involved beneficiaries who had exhausted their Medicare Part A entitlement, the Board finds that the Intermediary's DSH calculation was proper.

DECISION AND ORDER:

The Intermediary's calculation of the Provider's DSH adjustment was proper. The Intermediary's DSH calculation is affirmed.

Board Members Participating:

Irvin W. Kues  
Henry C. Wessman, Esquire  
Martin Hoover, Jr., Esquire  
Charles R. Barker

**Date of Decision:** April 7, 2000

FOR THE BOARD:

Irvin W. Kues  
Chairman